STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLTON E. BANKS,

Defendant-Appellant.

UNPUBLISHED
July 2, 1999

No. 202802
Oakland Circuit Court
LC No. 96-145671 FC

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Defendant and his co-defendants planned and executed armed robberies of a Mobil gas station and a Subway Sub Shop restaurant in Troy.[1] In each robbery, defendant and Ming Chan Ho planned to rob the business' employee at gunpoint and then kill the employee. Ho was the gunman on both occasions. Defendant had briefly worked at both the Mobil station and the Subway, and he used his knowledge of the store's layout and procedures to help plan the robberies. During the Mobil robbery, Ho shot, but did not kill, the employee, and shot at, but missed, the employee's visitor. During the Subway robbery, Ho shot and killed the employee.[2]

Consequently, a jury convicted defendant of first-degree premeditated murder, MCL 750.316; MSA 28.548, first-degree felony murder, MCL 750.316; MSA 28.548, possession of a firearm during the commission of those felonies, MCL 750.227b; MSA 28.424(2), conspiracy to commit first-degree premeditated murder and conspiracy to commit first-degree felony murder, MCL 750.157a; MSA 28.354(1), felony-firearm with regard to both of those felonies, conspiracy to commit two separate armed robberies, MCL 750.157a; MSA 28.354(1), MCL 750.529; MSA 28.797, felony firearm with regard to both of those felonies, and armed robbery (with regard to the Mobil gas station incident), MCL 750.529; MSA 28.797 and the accompanying felony-firearm. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction,[3] life imprisonment for the conspiracy to commit murder convictions, life imprisonment for the conspiracy to commit armed robbery convictions and life imprisonment for the armed robbery conviction, all to be served consecutively to two years' imprisonment for the felony-firearm convictions. Defendant now appeals as of right.

I

Defendant argues that he was deprived of the effective assistance of counsel because his trial counsel failed to seek severance of the counts arising from the Mobil and Subway offenses. To establish ineffective assistance of counsel, a defendant must show that (1) trial counsel's performance was below an objective standard of reasonableness according to prevailing professional norms, and (2) that there is a reasonable probability that absent counsel's errors, the outcome of the particular proceedings would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Graham,* 219 Mich App 707, 711; 558 NW2d 2 (1996). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *Stanaway, supra,* 446 Mich 687. The defendant must overcome the strong presumption that counsel used sound trial strategy. *People v Plummer,* 229 Mich App 293, 307; 581 NW2d 753 (1998). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Unless the trial court has held an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to the facts apparent on the record.

Here, defendant's trial counsel testified at the *Ginther* hearing that he withdrew his motion for severance as a matter of trial strategy. He explained that he hoped to convince the jury that defendant played no part in the robberies, and that he was merely present when Ho spontaneously committed the crimes. He also believed that if the counts were severed, the trial court would permit the prosecution to introduce evidence of the Mobil robbery at the Subway trial, and vice versa, pursuant to MRE 404(b). We agree that this was sound trial strategy, albeit ultimately unsuccessful. Accordingly, defendant has failed to establish ineffective assistance of counsel.

II

Defendant contends that the trial court abused its discretion when it denied his motion for a continuance after co-defendants Eric Whisnant and Darian Hall agreed to testify for the prosecution shortly before trial began. We review a decision to grant or deny a continuance for abuse of discretion. *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997).

Under the circumstances of this case, we find no abuse of discretion. Whisnant's and Hall's names appeared on the prosecutor's witness list on October 9, 1996, five months prior to trial. Hence, defendant was already on notice that they might be called by the prosecutor to testify at trial even before the prosecutor brought her February 10, 1997, motion to endorse them as witnesses. Further, as defense counsel admitted at the post-trial evidentiary hearing, their decision to testify against defendant was not altogether surprising. Moreover, the testimony of the codefendants did not alter the prosecutor's case against defendant. Hall and Whisnant's testimony merely corroborated Ming Ho's testimony, which had been on the record since defendant's preliminary examination in April 1996. Therefore, defense counsel was not required to investigate any new theories or facts. In any event, defense counsel was given ample time to discover the likely nature of Hall and Whisnant's testimony. He was presented with their videotaped statements a week prior to the commencement of trial, he was given several weeks prior to their testimony to investigate their credibility, and he was provided with the

opportunity to interview both co-defendants prior to their testimony. Moreover, the defense raised at trial was not altered by the co-defendant's testimony. Defendant still maintained, as he had prior to the endorsement of Hall and Whisnant, that he was merely present at both crime scenes.

Moreover, defendant has failed to show that he was prejudiced by the trial court's failure to grant his motion for adjournment. Although defendant appears to claim that he was prejudiced by the trial court's failure to grant a continuance, he has not specified how he was prejudiced. He has not set forth any facts pertinent to defendant's case that he could have discovered had the continuance been granted. Nor has defendant alleged that he would have altered his defense in some manner had he been given additional time. A defendant must be able to demonstrate that he was prejudiced by the trial court's failure to grant the continuance. *People v Wilson,* 397 Mich 76, 81; 243 NW2d 257 (1976). Here, defendant has failed to do so.

This case is distinguishable from *People v Suchy,* 143 Mich App 136; 371 NW2d 502 (1985). In *Suchy,* the defense counsel had four days to prepare to cross-examine the only two witnesses who would give direct testimony of the defendant's involvement in the alleged murder of her husband. This Court noted that the defendant's defense would be substantially altered by the testimony of her co-defendants and that defense counsel was unaware of what story the co-defendants would tell. *Id.,* 143-146. Under these circumstances, this Court determined that a continuance should have been granted. *Id.* Here, co-defendant Ho was already scheduled to give direct testimony regarding defendant's involvement in the Mobil robbery and the Subway murder. The late-endorsed co-defendants' testimony was only going to corroborate Ho's testimony. Furthermore, unlike the defendant in *Suchy,* defendant has failed to demonstrate prejudice.

IV

Defendant avers that the conviction of conspiracy to commit felony murder must be vacated because there is no such offense. We agree.

In *People v Hammond,* 187 Mich App 105; 466 NW2d 335 (1991), we held that the offense of "conspiracy to commit second-degree murder" is a non-existent offense, because conspiracy is based on planning and agreement, which are analytically inconsistent with second-degree murder, which is an unplanned offense. *Id.*, 107-109. Felony murder is, in essence, a second-degree murder which has been elevated to first-degree murder because it is committed in the course of one of the felonies specified by MCL 750.316; MSA 28.548. *People v Dumas,* 454 Mich 390, 397; 563 NW2d 31 (1997); *People v Warren,* 228 Mich App 336, 346-347; 578 NW2d 692 (1998).

The prosecutor argues that the conspiracy to commit felony murder conviction should be permitted to stand here, because this conviction lacked the "logical inconsistency" that was the basis of the *Hammond* decision. Instead, defendant and Ho planned in advance that Ho would murder the Subway employee on duty. The essence of this argument is that because the evidence would have supported a conviction of conspiracy to commit first-degree premeditated murder with respect to the Subway killing, the improper conviction of conspiracy to commit felony murder is not erroneous. We are sympathetic to this argument, because the evidence clearly would have warranted a conviction of

conspiracy to commit premeditated murder. Nonetheless, we cannot impose a de facto conviction of conspiracy to commit premeditated murder where the jury did not do so. We therefore reverse the conviction of conspiracy to commit felony murder, as well as the related felony firearm conviction.

V

Defendant challenges the four convictions of felony firearm associated with the four conspiracy convictions on grounds of insufficiency of the evidence. Because we have already decided to reverse one of these counts, we need only consider the other three.

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). One who does not actually possess a firearm may validly be convicted of felony-firearm as an aider and abettor. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981); *People v Buck*, 197 Mich App 404, 418; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb*, 444 Mich 853 (1993). However, the person must aid and abet either the acquisition or retention of the gun. *Johnson, supra*, 411 Mich 54; *Buck, supra*, 197 Mich App 418.

Here, the evidence indicated that several weeks prior to the Mobil station robbery defendant helped Ho acquire the .380 caliber semi-automatic handgun (used in both the Mobil robbery and the Subway murder) from defendant's friend and former co-worker, Otis Doss. Defendant and Ho went to see Doss three times in an attempt to acquire the handgun. On the third occasion, Doss sold Ho the gun for $250. Immediately after buying the gun, defendant took it apart and reassembled it, apparently to see how it worked. On October 4, 1994, defendant and Ho agreed that Ho would use the gun to rob the Mobil station and kill any witnesses, and that defendant would drive the getaway car. After the robbery, Ho and defendant divided the stolen money, and defendant stored the gun in the trunk of his car. Prior to the Subway murder, defendant bought additional bullets for the gun. Defendant helped plan the Subway robbery, advising defendant to murder the employee in the manager's office. Defendant accompanied Ho into the Subway shop with the intent of helping to carry away the safes. After Ho murdered the clerk, defendant asked him why he killed her before they got the money.

This evidence, viewed in a light most favorable to the prosecution, indicated that defendant helped to acquire and retain the gun in question. He encouraged Ho to use the gun during both the Mobil and Subway incidents and he provided assistance to Ho during those incidents as well as directly participating in both incidents. Under these circumstances, the evidence was sufficient to convict defendant of aiding and abetting felony-firearm in conjunction with the murder and robbery conspiracies.

We also find no merit in defendant's claim that the constitutional guarantee against double jeopardy[4] precludes the felony-firearm convictions connected to the conspiracy convictions. Defendant himself admits that the Supreme Court recently made clear in *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998), that double jeopardy is not violated and felony-firearm convictions should be upheld whenever a person possessing a firearm committed a felony other than those explicitly enumerated in the statute. Conspiracy to commit an offense is not one of those enumerated felonies.

See MCL 750.227b; MSA 28.424(2). Therefore, we decline to reverse the three remaining felony firearm convictions associated with the conspiracy convictions.

VI

Finally, defendant claims that the fourteen counts against him were "so duplicative and confusing that they were repeatedly mischaracterized by the attorneys and court. The confusion that arose from the nature and number of the counts was so prejudicial as to deny Appellant Banks his right to a fair trial." There is no merit to this argument. Defendant does not point to any "mischaracterization" of the charges to the jury by either the attorneys or the trial court, and we find none on the record. On the contrary, the record reveals that the charges against defendant were repeatedly, properly explained to the jury. Furthermore, prior to deliberation, the jury was provided with a written verdict form which also explained the charges against defendant. Defendant's assertion that the jury was confused by the charges against him is pure speculation.

VII

We note that the Judgment of Sentence does not reflect defendant's convictions and sentences for the Mobil robbery (Counts eleven through fourteen). Therefore, we remand this matter to the trial court for the preparation of an amended Judgment of Sentence which correctly reflects all of defendant's convictions and sentences.

CONCLUSION

We reverse the convictions and sentences for conspiracy to commit felony murder and the associated felony firearm charge. Additionally, we remand to the trial court for the preparation of an amended Judgment of Sentence which correctly reflects all of defendant's convictions and sentences. We affirm all other convictions and sentences. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] Co-defendant Ming Chan Ho played a major role in both robberies and murders. Co-defendants Darian Hall and Eric Whisnant participated in the Subway robbery and murder.

[2] Ho's conviction of first-degree murder in the Subway killing has been affirmed. See *People v Ho*, 231 Mich App 178; 585 NW2d 357 (1998).

[3] Defendant's conviction for first-degree premeditated murder and the accompanying felony-firearm conviction were dismissed. He was sentenced to life imprisonment without possibility of parole for the first-degree felony murder conviction.

[4] US Const, Am V; Const 1963, art 1, sec 15; *People v Torres*, 452 Mich 43, 63; 594 NW2d 540 (1996).